Supreme Court, U.S.
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No. —

In the

Supreme Court of the United States

PATRICIA W. SILVEY,

Petitioner,

v.

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Civil Service Reform Act of 1978, 5 U.S.C. §§ 3131 and 3395, authorizes federal agencies to reassign, demote and change the working conditions of Senior Executive Service employees at will, in derogation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)?

2. Whether the Fourth Circuit's decision, that unfavorable reassignments and job changes do not constitute adverse employment action(s), directly conflicts with the Supreme Court's decisions in *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, as well as with other circuit court decisions?

3. Whether either (1) a reassignment to a lesser job or (2) a substantial reduction of responsibility and authority, constitutes a "demotion" that is an "adverse employment action" under Title VII employment discrimination law?

4. In a hostile environment case under Title VII, is it a question of law for a court to decide, or instead a question for a jury to decide, whether harassing conduct is "severe or pervasive"?

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit, *Silvey v. Chao*, No. 02-1065, 38 Fed. Appx. 991, 2002 WL 1397248, is unpublished, and is reproduced in the attached Appendix ("App") at 1a. The Judgment and Opinion of the United States District Court for the Eastern District of Virginia, Civil Action No. 01-405-A, are unreported, and are reproduced in the Appendix at 4a and 5a respectively.

JURISDICTION

This Court has jurisdiction to review the *per curiam* decision of the United States Court of Appeals for the Fourth Circuit entered on June 28, 2002, to affirm summary judgment against Petitioner, by a Writ of Certiorari under 28 U.S.C. § 1254(1). (Note also that the Fourth Circuit denied Petitioner's Petition for Rehearing and Suggestion for Hearing En Banc, on September 4, 2002. (App. 10a.))

STATUTORY PROVISIONS INVOLVED

The full text of each statute below is supplied in the Appendix.

Civil Rights Act of 1964, as amended.
42 U.S.C. § 2000e-2(a):

> It shall be an unlawful employment practice for an employer –
> (1) to ... discriminate against any individual with respect to his compensation, terms, conditions or

privileges of employment, because of such individual's race, color, [or] sex ...

. . .

Civil Service Reform Act of 1978
5 U.S.C. § 3131:

It is the purpose of this subchapter to establish a Senior Executive Service to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality. The Senior Executive Service shall be administered so as to–

. . .

(5) enable the head of an agency to reassign senior executives to best accomplish the agency's mission;

. . .

(11) ensure compliance with all applicable civil service laws, rules, and regulations, including those related to equal employment opportunity ...

. . .

5 U.S.C. § 3395.

(a)(1) A career appointee in an agency–

(A) may, subject to paragraph (2) of this subsection, be reassigned to

any Senior Executive Service position in the same agency for which the appointee is qualified; and

(B) may transfer to a Senior Executive Service position in another agency for which the appointee is qualified, with the approval of the agency to which the appointee transfers.

STATEMENT OF THE CASE

Procedural History

Petitioner Patricia Silvey, Plaintiff-Appellant below, filed her judicial complaint alleging employment discrimination on the basis of race and sex (disparate treatment and hostile work environment) and retaliation, under 42 U.S.C. § 2000e et seq., as amended ("Title VII"), on March 13, 2001, in the United States District Court for the Eastern District of Virginia. Defendant-Appellee Chao (Department of Labor) filed a motion for summary judgment on October 24, 2001, which the District Court granted on November 20, 2001. (App. 4a.) The District Court's memorandum opinion argued that summary judgment was proper on grounds that (a) 5 U.S.C. § 3131 grants authority to federal agencies to reassign Senior Executive System employees at will, and (b) Ms. Silvey had not suffered an "adverse employment action." (App. 8a-9a.) Plaintiff-Appellant filed a motion to reconsider on December 5, which the District Court denied on January 4, 2002. Plaintiff-Appellant appealed.

By its unpublished *per curiam* decision on June 28, 2002, the United States Court of Appeals for the

Fourth Circuit affirmed the District Court's decision on the same grounds. (App. 1a.) Plaintiff-Appellant filed timely a motion for reconsideration and a suggestion for hearing *en banc*, which was denied on September 4, 2002. (App. 10a.) Plaintiff-Appellant Silvey now petitions this Court.

Relevant Facts

Petitioner Patricia W. Silvey, an African-American female who now holds a bachelor's and two advanced degrees, joined the Department of Labor ("DOL") in 1970 as a GS-5 level Manpower Development Specialist. In 1978 Ms. Silvey was permanently selected for the GS-14 level position as Deputy Director for MSHA's Office of Standards, Regulations, and Variances ("OSRV"), and was eventually promoted to GS-15. She served as Acting Director of the OSRV, then was selected for the Senior Executive Service ("SES") and permanent Director.

As Director of the OSRV, Ms. Silvey supervised her own staff, was the Assistant Secretary's principal advisor on all matters affecting regulatory policy for MSHA, and frequently chaired public rule-making hearings.

After Mr. J. Davitt McAteer became Assistant Secretary for MSHA in early 1994, Petitioner Ms. Silvey experienced the following:

(1) the duties assigned to her in her position description were taken away;
(2) she was reassigned away from the high-profile position of Director of the OSRV;
(3) her subordinate staff was

reassigned away from her;

(4) she was demoted from the position of Director of A&M to the position of Deputy Administrator for Metal;

(5) she was precluded from involvement in personnel matters regarding her subordinate staff;

(6) she was assigned an unsuitable office;

(7) she was given a performance evaluation that falsely rated her as deficient;

(8) she was required to report to a GS-15 level employee;

(9) she was precluded from serving on a panel to review qualifications of applicants applying for SES jobs;

(10) she was denied her career opportunities by limiting her communications with others both in the DOL and in the mining community; and

(11) she was excluded from meetings and involvement in projects, and she was denied even basic information required for running her organization.

District Court and Fourth Circuit Court Holdings At Issue

In its memorandum opinion supporting its grant of summary judgment, the District Court acknowledged nearly all of the 11 factual claims above. (App. 5a-7a.) For purposes of analysis, however, the District collapsed the 11 factual claims into the phrase "different positions or duties she was assigned." (App. 8a.)

Relying solely upon the language of 5 U.S.C. § 3131, the District Court dismissed Petitioner Ms. Silvey's claims:

> While Plaintiff [Ms. Silvey] may not have been happy with the different positions or duties she was assigned to at the MSHA, none of the reassignments or curtailments she experienced constituted a demotion. As an SES employee, Plaintiff was able to be reassigned to whatever position Assistant Secretary McAteer felt would be best for the agency, provide she was qualified for that position and properly notified of her reassignment.

(App. 8a.)

Specifically, the District Court peremptorily disposed of all 11 factual claims:

> The multitude of occurrences and impressions that Plaintiff cites in her brief simply do not add up to adverse action under Title VII.[] Taken in the light most favorable to the Plaintiff, Plaintiff has not established that she was subject to any adverse action at the MSHA.

(App. 9a.; (internal citation omitted.)

On appeal, the unpublished Fourth Circuit opinion, without discussing of any of the facts, affirmed *per curiam* the District Court's conclusion that a downgrade reassignment and other negative changes in job responsibility and authority do not constitute adverse employment actions:

> We conclude the district court properly concluded Silvey failed to establish a prima facie case of race and sex discrimination and retaliation because she failed to demonstrate that her reassignments within the Department of Labor constituted an adverse employment action.

(App. 2a.)

The Fourth Circuit without further comment expressly adopted the District Court's ruling that 5 U.S.C. § 3131 precluded Petitioner's claim as a matter of law:

> We therefore affirm the grant of summary judgment in favor of the DOL substantially on the reasoning of the district court.

(App. 2a.)

Conflicts With Supreme Court and Other Circuit Court Precedents

Relying solely upon 5 U.S.C. § 3131 (and § 3395 by implication), both the District Court and the Fourth Circuit held that job downgrades and reductions in responsibility and authority, when they affect an SES employee, do not constitute a demotion or adverse employment action for Title VII job discrimination purposes. No known Supreme Court or circuit court precedent has so held or suggested, and none were cited.

Other circuit courts have recognized most of the

11 factual circumstances that Petitioner suffered do constitute adverse employment actions. This Court, in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998), has noted that a "reassignment with significantly different responsibilities" constitutes a "tangible employment action" to support a Title VII claim. Other circuits have held that reduction in supervisory authority, staff and job responsibilities do constitute "demotion" events. The Fourth Circuit decision thus conflicts with Supreme Court and other circuit court precedents and should be reviewed.

The Fourth Circuit also held, as a matter of law, that Petitioner did not experience a hostile work environment. (App. 2a.) Despite the full briefing on the merits that presented evidence to support the 11 factual circumstances to establish the hostile work environment, the District Court did not expressly rule on the question. There is a split of the federal circuits over whether the harassing conditions (that give rise to a hostile work environment claim) should be evaluated initially by judges or by juries. A review and decision on this issue could resolve the split of authorities.

I.

CERTIORARI SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S INTERPRETATION OF 5 U.S.C. § 3131, AS PERMITTING FEDERAL AGENCIES TO DEMOTE SENIOR EXECUTIVE SERVICE EMPLOYEES AT WILL, DIRECTLY VIOLATES TITLE VII ANTI-DISCRIMINATION LAW

As quoted above, the Fourth Circuit affirmed the District Court's ruling that 5 U.S.C. § 3131 ("Section 3131") (and by implication § 3395) trumps Title VII of

the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (App. 2a.) Under the Fourth Circuit's decision, a black professional woman (Petitioner Silvey) serving in a department populated largely by white men cannot challenge demotions even where the evidence shows the demotions are unlawfully discriminatory.

A. The Fourth Circuit's Novel Judicially-Created Exception to Title VII.

Using Section 3131 the Fourth Circuit has opened a huge loophole that thwarts Title VII's anti-discrimination purpose. There is no legal warrant for this loophole, and a heavy weight of authority arrays against it. The Supreme Court has recognized that Title VII stands to protect against job discrimination anytime, anywhere:

> Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin.

Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 763 (1976) (citations omitted).

By its own language 5 U.S.C. § 3131 supports and executes Title VII policy; it does not change or limit Title VII protection of SES employees. Section 3131 itself declares its purpose "to establish a Senior Executive Service to ensure that the executive management of [the U.S. government] is responsive to the needs, policies and goals of the Nation and otherwise is of the highest quality." All of the statute's 14 expressed goals deal with compensation issues, accountability, efficiency, performance and adherence to existing employment

laws.

Section 3131 does "enable the head of an agency to reassign senior executives to best accomplish the agency's mission," as the District Court opined, but Section 3131(11) expressly declares that the SES must "ensure compliance with ... equal opportunity" laws. The Fourth Circuit's (and District Court's) opinion promotes the agency's reassignment power *ahead* of the agency's duty of nondiscrimination in demotions and transfers.

The companion statute, 5 U.S.C. § 3395, permits the reassignment and transfer of SES employees, but by no means does it express or imply that such job changes can violate Title VII anti-discrimination laws. No decisional authorities -- except the Fourth Circuit here -- have even suggested that either Section 3131 or 3395 modify the Civil Rights Act anti-discrimination laws in any way.

B. Conflicts Between Circuit Courts' Decisions.

The Fourth Circuit's decision conflicts with the sister circuit ruling in *Palmer v. Shultz*, 815 F.2d 84 (D.C. Cir. 1987). *Palmer* held that a "plaintiff may bring a Title VII claim for alleged discrimination with respect to *any employment decision* by an agency of the federal government." *Id.* at 97 (citing 42 U.S.C. § 2000e-16, emphasis added). In contradiction the Fourth Circuit affirmed that Section 3131 exempts federal government employment decisions dealing with SES employees.

Because the "policy of outlawing such discrimination should have the 'highest priority,'" this Court should review and reverse the Fourth Circuit's judicially constructed Title VII loophole. *Franks*, 424

U.S. at 763. A ruling by this Court could also resolve the conflict between the circuit courts.

II.
CERTIORARI SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S DECISION, THAT UNFAVORABLE JOB CHANGES AND REASSIGNMENTS DO NOT CONSTITUTE ADVERSE EMPLOYMENT ACTIONS, DIRECTLY CONFLICTS WITH SUPREME COURT AND OTHER CIRCUIT COURT PRECEDENTS

The Fourth Circuit decision here, affirming the District Court, directly conflicts with this Court's ruling in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). In *Ellerth*, this Court held that a "tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, *reassignment with significantly different responsibilities*, or a decision causing a significant change in benefits." 524 U.S. at 761 (emphasis added); *accord, Faragher v. City of Boca Raton*, 524 U.S. 775, 790 (1998)(employer liability may result from "discriminatory employment actions with tangible results, like ... promotion ... and [changes in] work assignment"); *see also Clark County School Dist v. Breeden*, 532 U.S. 268 (2001)(per curiam), *reversing on other grounds Breeden v. Clark County Sch. Dist.*, 232 F.3d 893, 2000 WL 991821 (9th Cir. 2000)(unpublished) (change of plaintiff's job duties and loss of supervisory responsibilities amount to adverse employment action).

Ruling directly opposite to *Ellerth* and *Faragher*, the courts below held that *not one* of Petitioner's experiences – the deprivation of supervisory duties, reassignment to a low profile position, subtraction of support staff, demotion from Director to Deputy

Administrator, assignment to inferior office space, exclusion from essential meetings, and disconnection from the flow of necessary information – constituted an "adverse employment action" to support a Title VII claim.[1] (App 2a; App. 5a-8a.)

Ellerth declared that a negative reassignment with a decrease in supervisory responsibilities alone would constitute an adverse employment action. *Ellerth*, 524 U.S. at 761. The Equal Employment Opportunity Commission's *Compliance Manual*,[2] at Section 2-II(B)(1), accords with *Ellerth* to aver that Title VII prohibits discriminatory employment actions that include "undesirable reassignment" and "work assignments." In Petitioner's case, the Fourth Circuit apparently refused to follow *Ellerth*.

Other circuits, by contrast, have followed the letter or logic of *Ellerth*. The Third Circuit, in *Durham Life Insurance Company v. Evans*, 166 F.3d 139 (1999), expressly followed *Ellerth* to hold that losing an office and support staff, and being deprived of key information files, amounted to adverse employment actions. 166 F.3d at 152-153 & 153-154. The Fifth, Seventh, Ninth and Tenth Circuits have found that experiences similar or comparable to those suffered by Petitioner did constitute adverse employment actions. *See Sharp v. City of Houston*, 164 F.3d 923, 933 (5th Cir. 1999) ("an

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[1] *Reeves v. Sanderson Plumbing*, 530 U.S. 133, 150 (2000), directs the courts to "give credence to [all] evidence favoring the nonmovant" in Title VII summary judgment decisions. The District Court below collapsed Petitioner Silvey's evidence into a dismissable phrase; the Fourth Circuit mentioned no evidence at all.

[2] The current version of the *Compliance Manual*, Section 2, updated May 12, 2000, is available on the EEOC website: http://www.eeoc.gov/policy/compliance.html.

adverse employment action can include a transfer, because it may serve as a demotion"); *Collins v. State of Illinois*, 830 F.2d 692, 704 (7th Cir. 1987) (librarian's undesired transfer with decrease in responsibility, and with downgrade of office space and other amenities, "amply demonstrated an adverse job action"); *Passantino v. Johnson & Johnson Consumer Prods., Inc.*, 212 F.3d 493, 506 (9th Cir. 2000) (effects on "a performance review" and "decreased job responsibilities" constituted adverse employment action); *Judie v. Hamilton*, 872 F.2d 919, 921 (9th Cir. 1989)(defendant's restricting plaintiff's supervisory duties constitute adverse employment action; jury question of whether the adverse action were racially motivated); *Jeffries v. State of Kansas*, 147 F.3d 1220, 1232-1233 (10th Cir. 1998)(professional mentor's refusal to supervise student could qualify as adverse employment action); *Sauers v. Salt Lake County*, 1 F.3d 1122, 1128 (10th Cir. 1993)(undesired reassignment constituted adverse employment action).

Notably, the Seventh Circuit in *Fortier v. Ameritech Mobile Communications, Inc.*, 161 F.3d 1106, 1112 n.7 (7th Cir. 1998) declared that "a demotion evidenced by ... a less distinguished title, ... significantly diminished material responsibilities, or other indices that might be unique" to the case, would amount to an adverse employment action. Similarly, "terminating supervisory authority over other employees could constitute an adverse employment action." *Id.* In complete harmony with *Ellerth*, *Fortier* held that "adverse job actions can include changes that do not involve quantifiable losses in pay or benefits." *Id.*

The Fourth Circuit's decision here thus directly conflicts with *Ellerth*, *Fortier*, the EEOC's *Compliance Manual*, and the other circuits' precedents on what

constitutes an adverse employment action. Title VII anti-discrimination law "is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment.'" *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)(citations omitted). Yet the Fourth Circuit's decision here reads Title VII quite narrowly, especially in comparison to this Court and the other circuits. *See* Margery Corbin Eddy, Comment, *Finding the Appropriate Standard for Employer Liability in Title VII Retaliation Cases: An Examination of the Applicability of Sexual Harassment Paradigms*, 63 Alb. L. Rev. 361, 372 (1999) ("The circuits disagree, however, on the proper meaning of 'adverse employment action.'" [footnote omitted]); *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998)(noting "a circuit split on this issue," citing cases and opting to adopt the majority view that runs contrary to the Fourth Circuit here). Upon granting certiorari and review, this Court could resolve the issue and the conflict among the circuit court decisions.

III

CERTIORARI SHOULD BE GRANTED BECAUSE THE FOURTH CIRCUIT'S PRACTICE OF DECIDING WHETHER HARASSING CONDUCT IS "SEVERE OR PERVASIVE" ACCORDS WITH SOME BUT CONFLICTS WITH OTHER CIRCUIT COURT PRECEDENTS

Under the precedents of some circuits and the indications of this Court, the District Court and the Fourth Circuit panel below erred by deciding the threshold question of Petitioner's hostile environment claim as a *matter of law*. (App. 2a; App. 8a-9a.) The

federal circuit courts' decisions divide dramatically over whether a court, or a jury, should decide initially whether there existed conditions "severe and pervasive" enough that they created a hostile work environment under Title VII.

A. The Supreme Court's Legal Framework

To decide whether an environment is hostile or abusive, a *trier of fact* must look at all the circumstances, which may include: (1) whether the defendant employer's conduct unreasonably interferes with the employee's work performance; (2) the nature of the conduct; (3) the frequency of the discriminatory conduct; (4) its severity; and (5) whether the plaintiff is psychologically harmed. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993). This Court in *Harris* declared the legal test for hostile environment that includes both subjective and objective elements. "So long as the environment would reasonably be perceived, and is perceived, as hostile or abusive," then it presents an actionable Title VII claim. *Id.* at 22.

The Supreme Court has not decided what types and numbers of harassing acts constitute "severe or pervasive" conduct that creates a hostile environment. Thus, there exists a broad and deep conflict on the threshold issue: is it for a court, or for a jury, to decide whether harassing conduct is "severe or pervasive"?

B. Circuit Court Decisions In Conflict

1. Judicial fact-finding rule.

Several circuits hold that judges should decide whether the alleged harassing acts created an objectively hostile environment. These circuits have

sought to define as a matter of law what types of harassing acts are "severe", how many such acts are "pervasive", and what combination of acts would cumulate into a hostile environment. Other circuits hold that the determination of whether harassment brought about a hostile environment is ordinarily a matter for a properly instructed jury.

The sharply divided *en banc* Eleventh Circuit decision, *Mendoza v. Borden, Inc.*, 195 F.3d 1238 (11th Cir. 1999), *cert. denied*, 529 U.S. 1068 (2000), presented the conflict clearly. The *Mendoza* majority concluded that the court itself should decide whether a hostile environment existed. "[W]e conclude that the conduct established by Mendoza was not sufficiently severe or pervasive to alter Mendoza's terms or conditions of employment." 195 F.3d at 1248 (evaluating facts under "severe or pervasive" test). Four dissenting judges urged the proper inquiry was not whether the court believed the harassment had created a hostile environment, but whether a "reasonable juror" could have drawn such a conclusion. 195 F.3d at 1259 (Tjoflat, J., dissenting). In her separate dissent Judge Barkett objected that the majority opinion was inconsistent with the 1991 Civil Rights Act:

> [T]he majority *has usurped the traditional role of the rightful finder of fact.* In the Civil Rights Act of 1991, Congress specifically amended Title VII . . . and specifically provided all plaintiffs seeking compensatory or punitive damages to have his or her case heard before a jury. . . . The mistrust of juries evidenced by the majority is at odds with the specific directive of Congress that the jury is to decide whether gender

> discrimination has occurred in the workplace.

195 F.3d at 1277-78 (emphasis added).

The *Mendoza* majority's judicial fact-finding rule has been endorsed by several other circuits. The Ninth Circuit has repeatedly held that the issue of whether harassment created a hostile environment is actually a question of law:

> The only issue is whether the conduct . . . was sufficiently severe or pervasive to alter the terms and conditions of . . . employment and create an abusive working environment. This presents a question of law . . . .

Woods v. Champion Chevrolet, 35 Fed. Appx. 453, 456, 2002 WL 848003 *3 (9th Cir. 2002)(reversing award of summary judgment); *see Fuller v. City of Oakland, California*, 47 F.3d 1522, 1527 (9th Cir. 1995)("whether the conduct . . . was sufficiently severe and pervasive to constitute sexual harassment is a question of law").[3]

Three other circuits also insist that a judge should resolve a summary judgment motion in a harassment case by deciding as a matter of law whether

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[3] *See, e.g., Little v. Windermere Relocation, Inc.*, 301 F.3d 958, 966 (9th Cir. 2002)(court decides whether plaintiff was subjected to hostile work environment); *Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 871-872 (9th Cir. 2001)(reversing finding after bench trial); *Smith v. Oakland Scavenger Co.*, 127 F.3d 1106 (Table), 1997 WL 661335 *4 (9th Cir.); *Woods v. Graphic Communications*, 925 F.2d 1195, 1201 (9th Cir. 1991)(question of law).

the harassment created a hostile environment. Among these circuits is the Fourth Circuit.[4] Spotlighting the Fourth Circuit's approach is *Hopkins v. Baltimore Gas and Electric Co.*, 77 F.3d 745 (4th Cir. 1996), where the appellate panel itself decided the factual question:

> After carefully considering the entire record before us, . . . *we are convinced* that the conduct of which Hopkins complains was neither sufficiently severe nor sufficiently pervasive to create an environment that a reasonable man would find hostile or abusive.

77 F.3d at 753 (emphasis added).

Similar judicial fact-finding rulings appear in decisions of the Sixth Circuit,[5] and in decisions of the

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[4]Other Fourth Circuit judicial fact-finding cases include: *Jones v. Department of Labor*, 24 Fed. Appx. 216, 217, 2002 WL 58220 *2 (4th Cir.)(judges weigh "the totality of the circumstances" to decide "severe or pervasive" question); *Gurganus v. Beneficial North Carolina, Inc.*, 25 Fed. Appx. 110, 112, 2001 WL 1627655 *2 (4th Cir.)(judicial fact-finding rule); *Green v. Caldera*, 19 Fed. Appx. 79, 81, 2001 WL 1098095 (4th Cir.)(judges decide outcome of "the objective analysis"); *EEOC v. R & R Ventures*, 244 F.3d 334, 340 (4th Cir. 2001)(judges decide severity of conduct); *Elkins v. Pharmacy Corp. of America*, 217 F.3d 838 (Table), 2000 WL 962669 *2 (4th Cir.)(judges evaluate harassing conduct); *Patterson v. County of Fairfax*, 215 F.3d 1320 (Table), 2000 WL 655984 *3-5 (4th Cir.)(same); *Johnson v. Danzig*, 213 F.3d 631 (Table), 2000 WL 458887 *2 (4th Cir.)(judges decide "severe or pervasive" question).

[5]*See, e.g.,Trepka v. Board of Education of the Cleveland City School Dist.*, 28 Fed. Appx. 455, 461, 2002 WL 104801 *5 (6th Cir.)(judges decide severity of harassment); *Selim v. Michigan Jobs Commission*, 23 Fed. Appx. 488, 490-491, 2001 WL 1556937 *2 (6th Cir.) (judges evaluate harassment facts); *Newman v. Federal Express Corp.*, 266 F.3d 401, 405 (6th Cir. 2001)(judges decide

Eighth Circuit.[6]

2. Jury Fact-Finding Rule.

Several circuits, however, have taken the opposite position. These courts have insisted that summary judgment can be granted in a harassment case only if *no reasonable jury* could find that the harassment involved created an objectively hostile environment. The Second Circuit, in *Gallagher v. Delaney*, 139 F.3d 338 (2d Cir. 1998), described the difference between a ruling "as a matter of law" by a judge, and a question of fact for a jury:

> A federal judge is not in the best position

"subjective" test of harassment); *Stevens v. United States Postal Service*, 21 Fed. Appx. 261, 263-264, 2001 WL 1298955 *2 (6th Cir.)(judges decide degree of harassment); *Hibbler v. Regional Medical Center at Memphis*, 12 Fed. Appx. 336, 338-339, 2001 WL 700829 *2 (6th Cir)(judges weigh facts of harassment); *Gwen v. Regional Transit Authority*, 7 Fed. Appx. 496, 501, 2001 WL 345793 *4 (6th Cir.)(harassing conduct evaluated "as a matter of law"); *McKethan-Jones v. Ohio Dept. of Health*, 7 Fed. Appx. 475, 483, 2001 WL 345782 *7 (6th Cir.)("the conduct in this case is simply neither severe nor pervasive enough to meet this circuit's . . . definition of an objectively hostile work environment.")

[6] *See, e.g.,Palesch v. Missouri Commission on Human Rights*, 233 F.3d 560, 566 (8th Cir. 2000)(judges decide whether "the harassing conduct was 'so severe or pervasive that it create[d] an abusive working environment.'"); *Clearwater v. Independent School District No. 166*, 231 F.3d 1122, 1128 (8th Cir. 2000)(judges evaluate harassing conduct); *Bradley v. Widnall*, 232 F.3d 626, 631-32 (8th Cir. 2000)(judges decide "severe or pervasive" element); *Hocevar v. Purdue Frederick Co.*, 223 F.3d 721, 738 (majority opinion)(harassment fell "short of proof of a hostile work environment"), 729 (dissenting opinion)("The ultimate determination as to whether the harassment was pervasive must be made by a jury.")(8th Cir. 2000); *Stuart v. General Motors Corp.*, 217 F.3d 621, 632 (8th Cir. 2000)(judge decides subjective element).

> to define the current sexual tenor of American cultures in their many manifestations. . . . [A] jury made up of a cross-section of our heterogeneous communities provides the appropriate institution for deciding whether borderline situations should be characterized as sexual harassment. . . . Whatever the early life of a federal judge, she or he usually lives in a narrow segment of the enormously broad American socio-economic spectrum, generally lacking the current real-life experience required in interpreting subtle sexual dynamics of the workplace based on nuances, subtle perceptions, and implicit communications.

139 F.3d at 342. The Second Circuit has applied this reasonable juror standard in several cases. *E.g.*, *Raniola v. Bratton*, 243 F.3d 610, 618 (2d Cir. 2001)("the evidence was legally sufficient for a reasonable jury [to find hostile work environment]"); *Fitzgerald v. Henderson*, 251 F.3d 345, 366 (2d Cir. 2001)(reversing summary judgment because the district court had "resolved questions of fact that are reserved for decision by a jury."); *Howley v. Town of Stratford*, 217 F.3d 141, 154 (2d Cir. 2000)(same rule).

The Third Circuit has likewise held that summary judgment decisions in harassment cases turn on whether a reasonable jury could have found the harassment created a hostile environment. In *Abramson v. William Paterson College of New Jersey*, 260 F.3d 265 (3d Cir. 2001), the court repeatedly invoked this standard:

> The proper inquiry at this stage was

> whether a reasonable factfinder could view the evidence as showing that Abramson's treatment was attributable to her religious faith and practice. . . . [A] jury could find that the harassment was pervasive. . . . A jury could also reasonably conclude that Abramson was detrimentally affected by the environment . . . Abramson made a sufficient showing . . . that a jury could find that a reasonable person of her religion would find the conduct alleged to be so harmful that it altered her working conditions.

260 F.3d at 277-80; *see Aman v. Cort Furniture Rental Corp.*, 85 F.3d 1074, 1082 (3d Cir. 1996)(using the "reasonable jury" rule).

The First and Seventh Circuit appellate panels do not judicially determine whether the facts amount to a hostile environment existed, but instead inquire only whether a reasonable jury could have found that the harassment had brought about that result. *E.g., Patton v. Indianapolis Public School Bd.*, 276 F.3d 334, 339 (7th Cir. 2002)("reasonable jury" test to decide whether harassment was "severe or pervasive"); *Cook v. Henderson*, 29 Fed. Appx. 386, 389, 2002 WL 252535 *3 (7th Cir.)(same rule); *Rivera-Rodriguez v. Frito Lay Snacks Caribbean*, 265 F.3d 15, 24 (1st Cir. 2001)(issue was "whether a reasonable jury could find that [the situation amounted] to a hostile work environment."); *Hudson v. C.P.Rail System*, 24 Fed. Appx. 610, 612-613, 2001 WL 1631718 *1 (7th Cir.)(affirming application of "reasonable jury" rule).

C. Supreme Court Precedents Incline Toward Jury Fact-Finding Rule.

When the courts – as in Petitioner's case – judicially decide the fact-intensive issue of harassment, they squarely conflict with indications of this Court. In *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), for example, this Court found error in the district court's deciding the severity and pervasiveness of conduct, noting that the decision was for the trier of fact:

> [T]he District Court erred in relying on whether the conduct "seriously affect[ed] plaintiff's psychological well-being" or led her to "suffe[r] injury." Such an inquiry may needlessly focus *the factfinder's* attention on concrete psychological harm, an element Title VII does not require.

510 U.S. at 22 (emphasis added). Similarly, in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), the Court made clear that disputes about the animus underlying alleged harassment are necessarily factual issues:

> *A trier of fact* might reasonably find [gender based] discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.

523 U.S. at 80 (emphasis added).

In Petitioner's case here, the Fourth Circuit's

practice effectively nullified Congress's 1991 enactment that grants a right to jury trial in all Title VII cases. 42 U.S.C. § 1981a. The same practice of judicial fact-finding, which prevails in five circuits, means that a plaintiff's harassment case cannot survive summary judgment and obtain the jury trial guaranteed by Congress, unless one or more judges first conclude that there was a hostile environment. That practice defeats the language and purpose of 42 U.S.C. § 1981a and conflicts with the decisions of other circuit courts.

CONCLUSION

This case presents (1) a clash of statutory directives that the Fourth Circuit resolved *against* Title VII, and (2) vexing conflicts between the Fourth Circuit and the decisions of this Court and other circuit courts. Petitioner respectfully requests this Court grant the writ of certiorari to resolve these issues.

Respectfully submitted,
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(any footnotes trail the end of each document)

No. 02-1065

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PATRICIA W. SILVEY,
Plaintiff-Appellant,

v.

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Defendant-Appellee.

June 19, 2002, Submitted

June 28, 2002, Decided

COUNSEL:
David H. Shapiro, Heidi S. Rhodes, SWICK & SHAPIRO, P.C., Washington, D.C., for Appellant.

Paul J. McNulty, United States Attorney, Rachel C. Ballow, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

JUDGES:
Before NIEMEYER, WILLIAMS, and GREGORY, Circuit Judges.

OPINION:

PER CURIAM:
Patricia W. Silvey appeals the district court's order

granting summary judgment in favor of Elaine Chao, the Secretary of the Department of Labor ("DOL"), on her race and sex discrimination and retaliation claims in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. § § 2000e to 2000e-17 (West 1994 & Supp. 2001), and the district court's denial of reconsideration of that order. We affirm. [HN1] We review a grant of summary judgment de novo. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988). Summary judgment is appropriate only if there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). We view the evidence in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

We have reviewed the parties' briefs, the joint appendix, and the district court's orders. We conclude the district court properly concluded Silvey failed to establish a prima facie case of race and sex discrimination and retaliation because she failed to demonstrate that her reassignments within the Department of Labor constituted an adverse employment action. *See Von Gunten v. Maryland*, 243 F.3d 858, 865-66 (4th Cir. 2001); *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (en banc).

Silvey also argues the district court failed to address her hostile work environment claim. We assume, arguendo, that Silvey's reference to a hostile environment claim in the opening paragraph of her complaint was sufficient to raise a hostile environment claim. Silvey, however, has failed to demonstrate that she was harassed on the basis of her sex or race, or that the harassment was sufficiently severe or pervasive to alter the terms and

conditions of her employment. *See Causey v. Balog*, 162 F.3d 795, 801 (4th Cir. 1998). We therefore affirm the grant of summary judgment in favor of the DOL substantially on the reasoning of the district court. *See Silvey v. Chao*, No. CA-01-405-A (E.D. Va. Nov. 20, 2001 & Jan. 4, 2002).

We deny Silvey's motion for the court to take judicial notice. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

No. 01-405-A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PATRICIA W. SILVEY,
Plaintiff,

v.

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Defendant.

11/20/02

ORDER

This matter comes before the Court on Defendant's motion for summary judgment or in the alternative to dismiss the complaint. For the reasons stated in the accompanying memorandum opinion, it is hereby,

ORDERED that Defendant's motion for summary judgment is GRANTED and this case is DISMISSED.

CHIEF UNITED STATES DISTRICT JUDGE

Alexandria, Virginia November 20, 2001

No. 01-405-A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

PATRICIA W. SILVEY,
Plaintiff,

v.

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Defendant.

Dated 11/20/01

MEMORANDUM OPINION

This matter comes before the Court on Defendant's motion for summary judgment or in the alternative to dismiss the complaint. Plaintiff has brought two claims against the Defendant under Title VII: discrimination based on sex and race and retaliation.

Plaintiff is a Senior Executive Service ("SES") employee with the Mine Safety and Health Administration ("MSHA"), a division of the United States Department of Labor. Plaintiff has been an SES employee with MSHA since 1983. 3. Davitt McAteer was appointed Assistant Secretary in charge of MSHA in 1994. Since Assistant Secretary McAteer's appointment, Plaintiff's position at MSHA has been changed several times, as have her duties and office location. In her complaint, Plaintiff alleges that these actions are the result of racial, gender and retaliatory discrimination.

Before McAteer's appointment, Plaintiff engaged in chairing public rule-making hearings. McAteer took this responsibility away from Plaintiff McAteer explained that during these hearings, Plaintiff answered substantive questions and those answers later had to be corrected. In October 1998 Plaintiff was reassigned to the position of Director of Administration and Management. This reassignment did not affect any of the terms and conditions of Plaintiff's pay. On October 29, 1998 Plaintiff received a Memorandum of Concern from McAteer noting errors that Plaintiff had made in preparing a rule while still in the position of Director of the Office of Standards, Regulations and Variances. In March 1999 McAteer met with the Plaintiff to discuss his dissatisfaction with her performance as Director of Administration. In July 1999 Plaintiff received a Memorandum of Admonishment from Deputy Assistant Secretary Nichols, noting his displeasure with Plaintiffs performance on an assignment. On July 7, 1999 McAteer provided Plaintiff with a bullet list of performance improvement requirements. Plaintiff contends that she hired an attorney to challenge this letter, but there is no evidence in the record to support this assertion, nor is there any evidence that McAteer knew of Plaintiff's action.

In December 1999 McAteer announced the reassignment of four SES employees, including the Plaintiff. At this point, Plaintiff was reassigned as Deputy Administrator for Metal and Nonmetal Safety and Health. Plaintiff maintained her salary, but her office was changed, in addition to the offices of two other managers. McAteer explained that Plaintiff's troubled performance in her previous positions, in addition to the need for more personnel in the growing Metal/Nonmetal branch of the MSHA, prompted her

reassignment to this position. Subsequent to her reassignment, Plaintiff received a bonus of $10,212 in December of 1999.

As Deputy Administrator for Metal and Nonmetal Safety and Health, Plaintiff works with another Deputy Administrator, Robert Friend. Robert Friend is not an SES employee, but is a GS-15. In addition, Plaintiff works under the Administrator of the Metal/Nonmetal branch, Ernest Teaster. Teaster received his GED in 1959 and worked in coal mines from 1963 through 1969. In 1969 Teaster began working for the MSHA and has been working for the agency in various capacities since that time. Plaintiff contends that her reassignment to this position constituted a demotion, in part because of the limited academic education of her supervisor and the GS-15 level of her co-deputy.

In addition to these reassignments and curtailment of duties, Plaintiff also alleges further discriminatory and retaliatory conduct. During McAteer's tenure at MSHA, staff changes were made within Plaintiff's division by MSHA senior management. Plaintiff was also prevented, in the Fall of 1999, from making the selection of a panel to review applicants for positions which she supervised at that time. Plaintiff's office, upon her reassignment to Deputy Administrator for Metal and Nonmetal Safety and Health, was approximately half the size of her co-deputy. Plans were subsequently made to remodel the offices to make them the same size. Plaintiff further alleges that the office of the Assistant Secretary deals primarily with Friend, rather than equally with both co-deputies and that Friend is put in charge when Teaster is absent more often than Plaintiff. Plaintiff alleges that she was sent a threatening package from someone in MSHA while at a Mine Rescue Conference in Las Vegas. Plaintiff offers no

proof that this package was sent by any of her supervisors at MSHA, nor did she inform her immediate supervisor of the package when she received it.

Summary judgment is appropriate where there is no genuine issue as to any material fact. Fed. R. Civ. P. 56 (e). Once a motion for summary judgment is properly made and supported, the opposing party has the burden of showing that a genuine dispute exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). A material fact in dispute appears when its existence or non-existence could lead a jury to different outcomes. *See Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, 248 (1986). A genuine issue exists when there is sufficient evidence on which a reasonable jury could return a verdict in favor of the non-moving party. See *id.* Mere speculation by the non-moving party "cannot create a genuine issue of material fact." *Beale v. Hardy*, 769 F.2d 213, 214 (4th Cir. 1986). Summary judgment is appropriate when, after discovery, a party has failed to make a "showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.v Catrett*, 477 U.S. 317, 322 (1986). When a motion for summary judgment is made, the evidence presented must always be taken in the light most favorable to the non-moving party. *Smith v. Virginia Commonwealth Univ.*, 84 F.3d 672, 675 (4th Cir. 1 996) (en banc).

Plaintiff in this case is an SES employee working for a government agency. Title 5 section 3131 of the United States Code establishes the Senior Executive Service and mandates that the SES shall be administered to "enable the head of an agency to reassign senior executives to best accomplish the agency's mission." 5 U.S.C. § 3131(5). The reassignment

of SES employees is further explained in section 3395: "A career appointee in an agency ... may, subject to paragraph (2) of this subsection, be reassigned to any Senior Executive Service position in the same agency for which the appointee is qualified" 5 U.S.C. § 3 13 l(a)(l)(A). The Assistant Secretary, as an arm of the Secretary of Labor, has broad discretion in determining where to place SES employees in order to "best accomplish the agency's mission". 5 U.S.C. §3131(5). While Plaintiff may not have been happy with the different positions or duties she was assigned to at the MSHA, none of the reassignments or curtailments she experienced constituted a demotion. As an SES employee, Plaintiff was able to be reassigned to whatever position Assistant Secretary MeAteer felt would be best for the agency, provided she was qualified for that position and properly notified of her reassignment.

Plaintiff maintained her SES status at MSHA, maintained her SES salary, received a bonus in 1999, and retained an upper level management position at MSHA. The multitude of occurrences and impressions that Plaintiff cites in her brief simply do not add up to adverse action under Title VII. See Bristow v. Daily Press. Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) (noting that "[e]very job has its frustrations, challenges and disappointments; these inhere in the nature of work."). Taken in the light most favorable to the Plaintiff, Plaintiff has not established that she was subject to any adverse action at the MSHA. As the Fourth Circuit has noted, "[e]mployment discrimination laws require as an absolute precondition to suit that some adverse employment action have occurred." *Id.* Thus, since there is no genuine issue of material fact that an "adverse employment action" has occurred in this case, Plaintiff cannot maintain a suit based upon racial discrimination,

gender discrimination or retaliation. Defendant's motion for summary judgment will be granted, and this case will be dismissed.

An appropriate order shall issue.
CHIEF UNITED STATES DISTRICT JUDGE
Alexandria, Virginia
November 20 , 2001

No. 02-1065

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PATRICIA W. SILVEY,
Plaintiff-Appellant,

v.

ELAINE L. CHAO, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Defendant-Appellee.

Filed September 4, 2002

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

CLERK

Title 42 USC Section 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Title 5 USC, Section 3131.

It is the purpose of this subchapter to establish a Senior Executive Service to ensure that the executive management of the Government of the United States is responsive to the needs, policies, and goals of the Nation and otherwise is of the highest quality. The Senior Executive Service shall be administered so as to -

(1) provide for a compensation system, including salaries, benefits, and incentives, and for other conditions of employment, designed to attract and retain highly competent senior executives;

(2) ensure that compensation, retention, and tenure are contingent on executive success which is measured on the basis of individual and organizational performance (including such factors as improvements in efficiency, productivity, quality of work or service, cost efficiency, and timeliness of performance and success in meeting equal employment opportunity goals);

(3) assure that senior executives are accountable and responsible for the effectiveness and productivity of employees under them;

(4) recognize exceptional accomplishment;

(5) enable the head of an agency to reassign senior executives to best accomplish the agency's mission;

(6) provide for severance pay, early retirement, and placement assistance for senior executives who are removed from the Senior Executive Service for nondisciplinary reasons;

(7) protect senior executives from arbitrary or capricious actions;

(8) provide for program continuity and policy advocacy in the management of public programs;

(9) maintain a merit personnel system free of prohibited personnel practices;

(10) ensure accountability for honest, economical, and efficient Government;

(11) ensure compliance with all applicable civil service laws, rules, and regulations, including those related to equal employment opportunity, political activity, and conflicts of interest;

(12) provide for the initial and continuing systematic development of highly competent senior executives;

(13) provide for an executive system which is guided by the public interest and free from improper political interference; and

(14) appoint career executives to fill Senior Executive Service positions to the extent practicable, consistent with the effective and efficient implementation of agency policies and responsibilities.

Title 5 USC, Section 3395.

(a)(1) A career appointee in an agency -

(A) may, subject to paragraph (2) of this subsection, be reassigned to any Senior Executive Service position in the same agency for which the appointee is qualified; and

(B) may transfer to a Senior Executive Service position in another agency for which the appointee is qualified, with the approval of the agency to which the appointee transfers.

(2)(A) Except as provided in subparagraph (B) of this paragraph, a career appointee may be reassigned to any Senior Executive Service position only if the career appointee receives written notice of the reassignment at least 15 days before the effective date of such reassignment.

(B)(i) A career appointee may not be reassigned to a Senior Executive Service position outside the career appointee's commuting area unless -

(I) before providing notice under subclause (II) of this clause (or seeking or obtaining the consent of the career appointee under clause (ii) of this subparagraph to waive such notice), the agency consults with the career appointee on the reasons for, and the appointee's preferences with respect to, the proposed reassignment; and

(II) the career appointee receives written notice of the reassignment, including a statement of the reasons for the reassignment, at least 60 days before the effective date of the reassignment.

(ii) Notice of reassignment under clause (i)(II) of this subparagraph may be waived with the written consent of the career appointee involved.

(b)(1) Notwithstanding section 3394(b) of this title, a limited emergency appointee may be reassigned to another Senior Executive Service position in the same agency established to meet a bona fide, unanticipated,

urgent need, except that the appointee may not serve in one or more positions in such agency under such appointment in excess of 18 months.

(2) Notwithstanding section 3394(b) of this title, a limited term appointee may be reassigned to another Senior Executive Service position in the same agency the duties of which will expire at the end of a term of 3 years or less, except that the appointee may not serve in one or more positions in the agency under such appointment in excess of 3 years.

(c) A limited term appointee or a limited emergency appointee may not be appointed to, or continue to hold, a position under such an appointment if, within the preceding 48 months, the individual has served more than 36 months, in the aggregate, under any combination of such types of appointment.

(d) A noncareer appointee in an agency -

(1) may be reassigned to any general position in the agency for which the appointee is qualified; and

(2) may transfer to a general position in another agency with the approval of the agency to which the appointee transfers.

(e)(1) Except as provided in paragraph (2) of this subsection, a career appointee in an agency may not be involuntarily reassigned -

(A) within 120 days after an appointment of the head of the agency; or

(B) within 120 days after the appointment in the agency of the career appointee's most immediate supervisor who -

(i) is a noncareer appointee; and

(ii) has the authority to make an initial appraisal of the career appointee's performance under subchapter II of chapter 43.

(2) Paragraph (1) of this subsection does not apply with respect to -

(A) any reassignment under section 4314(b)(3) of this title; or

(B) any disciplinary action initiated before an appointment referred to in paragraph (1) of this subsection.

(3) For the purpose of applying paragraph (1) to a career appointee, any days (not to exceed a total of 60) during which such career appointee is serving pursuant to a detail or other temporary assignment apart from such appointee's regular position shall not be counted in determining the number of days that have elapsed since an appointment referred to in subparagraph (A) or (B) of such paragraph.

Supreme Court, U.S.
FILED
FEB 5 2003
OFFICE OF THE CLERK

No. 02-845

In the Supreme Court of the United States

PATRICIA W. SILVEY, PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether the court of appeals properly held that petitioner's lateral transfers did not constitute adverse employment actions under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, in the absence of any decrease in her salary and benefits or a change in her employment status.

2. Whether the court of appeals properly held that petitioner's conclusory allegations of harassment are insufficient to avoid summary judgment on her claim of hostile work environment.

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In the Supreme Court of the United States

No. 02-845

PATRICIA W. SILVEY, PETITIONER

v.

ELAINE L. CHAO, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1a-3a) is unpublished, but the judgment is noted at 38 Fed. Appx. 991. The memorandum and order of the district court (Pet. App. 4a-10a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 2002. A petition for rehearing was denied on September 4, 2002 (Pet. App. 11a). The petition for a writ of certiorari was filed on December 2, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was an employee of the Mine Safety and Health Administration (MSHA), a component of the Department of Labor. The MSHA is headed by an Assistant Secretary of Labor and organized around two primary components: the Office of Coal Mine Safety and Health, and the Office of Metal and Nonmetal Mine Safety and Health. There are, in addition, six "directorates" that provide support for the two central components. See <http://www.msha.gov/programs/programs.htm> (Mine Safety and Health Administration organizational chart). In 1978, petitioner was appointed Deputy Director of the Office of Standards, Regulations, and Variances, one of the six directorates. Pet. 4. In 1983, she became a career appointee within the federal government's Senior Executive Service (SES), 5 U.S.C. 3131, and was promoted to Director. *Ibid.*; Pet. App. 5a. Petitioner served in that position for approximately 15 years.

In 1994, J. Davitt McAteer became the Assistant Secretary of Labor responsible for the MSHA. In October 1998, McAteer reassigned petitioner to the position of Director of the Office of Administration and Management, another of the agency's six directorates. Shortly thereafter, McAteer sent petitioner a "Memorandum of Concern" noting certain errors she had made in her previous position. Pet. App. 5a-6a. McAteer remained dissatisfied with petitioner's performance as Director of the Office of Administration and Management, and he met with her in March 1999 to discuss his concerns. *Id.* at 6a. In July 1999, Deputy Assistant Secretary Marvin Nichols sent petitioner a "Memorandum of Admonishment" detailing petitioner's poor performance on an assignment. *Ibid.* That same month,

McAteer sent petitioner a list of requirements for improving her job performance.

In December 1999, McAteer announced the reassignment of four SES managers, including petitioner. Petitioner was transferred to the Office of Metal and Nonmetal Safety and Health. Pet. App. 6a. That Office—one of the two central components of the MSHA—previously had one Deputy Administrator. McAteer created a second Deputy position and gave it to petitioner. As a result, each of the central components had one Administrator and two Deputy Administrators, one of whom was a GS-15 employee and one of whom was a member of the SES. *Id.* at 7a.

Petitioner was at all times a senior executive within the agency. Pet. App. 9a. She began as the head of one directorate, was reassigned as the head of another directorate, and again reassigned to share the position of second-in-command of one of the MSHA's primary components. Her reassignments had no effect on her compensation. *Id.* at 6a-7a, 9a. In fact, petitioner received a bonus of $10,212 in 1999, shortly after her second reassignment. *Id.* at 7a.

2. In March 2001, petitioner filed a complaint in the district court alleging that the Department of Labor had discriminated against her on the basis of race and sex, and retaliated against her for pursuing an equal employment opportunity complaint, both in violation of Title VII of the Civil Rights Act of 1964, codified as amended at 42 U.S.C. 2000e *et seq.* Pet. 3. Following discovery, the district court entered summary judgment for the Department of Labor. The court concluded that petitioner failed to present any evidence that she had suffered an adverse employment action, an essential element of a prima facie case under Title VII. Pet. App. 9a. It observed that petitioner maintained an

upper-level management position at MSHA even after the challenged reassignments. *Ibid.* Moreover, the reassignments had no effect on petitioner's SES status, salary, or benefits. *Ibid.* Finally, the court explained, "[t]he multitude of occurrences and impressions that [petitioner] cites in her brief simply do not add up to adverse action under Title VII." *Ibid.*

The court of appeals affirmed in a brief, unpublished per curiam opinion. Pet. App. 1a-3a. With respect to petitioner's claims of disparate treatment, the court determined, based on its review of "the parties' briefs, the joint appendix, and the district court's orders," that "the district court properly concluded [that petitioner] failed to establish a prima facie case of race and sex discrimination and retaliation because she failed to demonstrate that her reassignments within the Department of Labor constituted an adverse employment action." *Id.* at 2a. It further held that petitioner failed to make out a hostile work environment claim. Assuming *arguendo* that petitioner's "reference to a hostile environment claim in the opening paragraph of her complaint was sufficient to raise a hostile environment claim," the court concluded that she had not demonstrated that she was harassed on the basis of sex or race or that any such harassment was sufficiently severe or pervasive to alter the terms and conditions of her employment. *Id.* at 2a-3a.

ARGUMENT

The court of appeals' judgment is correct and its unpublished opinion does not conflict with any decision of this Court or other courts of appeals. Therefore, review by this Court is not warranted.

1. In order to establish a prima facie case of employment discrimination under *McDonnell Douglas*

Corp. v. *Green*, 411 U.S. 792 (1973), a plaintiff must produce evidence that she suffered some adverse employment action. See *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 506-507 (1993). Petitioner argues that her two job transfers were adverse actions. However, neither transfer affected petitioner's salary, benefits, or her status as an SES employee. Indeed, petitioner received a bonus shortly after her second reassignment. At all times, she retained an upper management, SES-level position in the MSHA.

Every court of appeals to consider the question has held that lateral transfers such as those at issue here can constitute adverse employment actions under Title VII only if they entail some significant detrimental change in the terms and conditions of the plaintiff's employment. See *White* v. *Burlington N. & Santa Fe Ry.*, 310 F.3d 443, 450 (6th Cir. 2002); *Patrolmen's Benevolent Ass'n* v. *City of New York*, 310 F.3d 43, 51 (2d Cir. 2002); *Vasquez* v. *County of Los Angeles*, 307 F.3d 884, 890-891 (9th Cir. 2002); *Soledad* v. *United States Dep't of Treasury*, 304 F.3d 500, 507 (5th Cir. 2002); *Marrero* v. *Goya of Puerto Rico, Inc.*, 304 F.3d 7, 23 (1st Cir. 2002); *Stutler* v. *Illinois Dep't of Corrs.*, 263 F.3d 698, 702 (7th Cir. 2001); *Hinson* v. *Clinch County, Ga. Bd. of Educ.*, 231 F.3d 821, 829 (11th Cir. 2000); *Brown* v. *Brody*, 199 F.3d 446, 455-456 (D.C. Cir. 1999); *Boone* v. *Goldin*, 178 F.3d 253, 256 (4th Cir. 1999); *Sanchez* v. *Denver Pub. Schs.*, 164 F.3d 527, 532 n.6 (10th Cir. 1998); *Ledergerber* v. *Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997); cf. *DiIenno* v. *Goodwill Indus.*, 162 F.3d 235, 236 (3d Cir. 1998) (holding that "a transfer to a job that an employer knows an employee cannot do may constitute adverse employment action"). The judgment below rests on the application of that settled legal princi-

ple to the facts of this case and does not warrant further review.

a. Petitioner argues (Pet. 9) that the court of appeals "has opened a huge loophole" in Title VII's protections for SES employees subject to discretionary reassignment under 5 U.S.C. 3131 (providing that the head of an agency may "reassign senior executives to best accomplish the agency's mission"). That is incorrect. The court of appeals did not so much as mention Section 3131 in its brief opinion. And, while the district court observed that petitioner's reassignments were consistent with Section 3131, it did not hold that such reassignments *never* can constitute an adverse employment action. To the contrary, the district court's holding rested on its conclusion that "none of the reassignments or curtailments [petitioner] experienced constituted a demotion" either in form or substance because petitioner "retained an upper level management position" with no change in salary or benefits, and because the various other factors of which she complained were insufficient to render her reassignments materially adverse. Pet. App. 9a.

b. Petitioner contends that her reassignments entailed significant negative changes to her employment because the new positions were less visible or involved fewer supervisory responsibilities. Pet. 11-12. The courts below rejected that fact-bound claim, concluding that "[t]he multitude of occurrences and impressions" cited by petitioner were insufficient to render the lateral transfers materially adverse. Pet. App. 9a. Contrary to petitioner's assertions (Pet. 12-13), that judg-

ment does not conflict with decisions from other courts of appeals concerning lateral transfers.[1]

Petitioner relies, for example, on *Durham Life Insurance Co.* v. *Evans*, 166 F.3d 139 (1999), in which the court of appeals for the Third Circuit affirmed the district court's finding of an adverse employment action where the plaintiff was denied "specific, negotiated conditions" of her position and was stripped of many of her confidential files, making it impossible for her to do her work. *Id.* at 153. Here, in contrast, there is no evidence that petitioner's superiors set her up to fail by depriving her of the necessary tools of her position or

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[1] Petitioner cites (Pet. 14) *Wideman* v. *Wal-Mart Stores, Inc.*, 141 F.3d 1453, 1456 (11th Cir. 1998), as evidence of a circuit split on the question whether a purely lateral transfer can constitute an adverse employment action. That is incorrect. The split identified in *Wideman* concerns the independent question whether actions by private employers that do not rise to the level of "ultimate employment decision[s]" are actionable as unlawful retaliation under Title VII, 42 U.S.C. 2000e-3. The Eleventh Circuit's affirmative answer to that question is not "contrary to [the judgment of] the Fourth Circuit here." Pet. 14. Like the Eleventh Circuit, the Fourth Circuit has held that discriminatory changes in the terms, conditions, and benefits of employment that fall short of ultimate employment decisions can give rise to liability under Section 2000e-3. *Von Gunten* v. *Maryland*, 243 F.3d 858, 865 (4th Cir. 2001) ("[C]onduct short of 'ultimate employment decisions' can constitute adverse employment action for purposes of § 2000e-3.") (cited at Pet. App. 2a). The Fourth Circuit has not had cause to delineate the precise bounds of Section 2000e-16—which prohibits discriminatory "personnel actions" by federal employers—but the court has made clear that its proscription extends beyond actions such as "hiring, granting leave, discharging, promoting, and compensating." *Von Gunten*, 243 F.3d at 866 n.3 (quoting *Mattern* v. *Eastman Kodak Co.*, 104 F.3d 702, 707 (5th Cir.), cert. denied, 522 U.S. 932 (1997)).

transferring her to a job that they knew she could not do. Cf. *DiIenno*, 162 F.3d at 236.

Petitioner's reliance on cases such as *Collins* v. *Illinois*, 830 F.2d 692 (7th Cir. 1987), and *Passantino* v. *Johnson & Johnson Consumer Products, Inc.*, 212 F.3d 493 (9th Cir. 2000), is similarly unavailing. The Seventh Circuit in *Collins* concluded that a purportedly lateral transfer constituted an adverse employment action when the plaintiff was placed in a new department where her supervisors "seemed unsure of what [her] responsibility and authority would be," was "relegated to doing [library] reference work instead of consulting," was moved from a private office to a receptionist's station where she no longer had use of a telephone to "conduct her business responsibilities," "was not allowed to have business cards printed and * * * was no longer listed in professional publications as a library consultant." 830 F.2d at 704. And in *Passantino*, the Ninth Circuit found that the plaintiff suffered an adverse employment action when, *inter alia*, her supervisors transferred accounts out of her portfolio, prevented her from receiving information she needed in order to do her job, and denied her promotions. 212 F.3d at 506. In contrast to those cases, there is no evidence here that petitioner was denied any opportunity for advancement. Nor was she transferred to what was, in effect, a lesser position within the MSHA. Cf., *e.g.*, *Sharp* v. *City of Houston*, 164 F.3d 923, 934 (5th Cir. 1999) (affirming, on plain error review, jury's finding of First Amendment retaliation where plaintiff's transfer "was a constructive demotion"); *Jeffries* v. *Kansas*, 147 F.3d 1220, 1233 (10th Cir. 1998) (finding retaliatory adverse employment action where plaintiff's mentor refused to continue supervising her as a student, therefore "depriv[ing her] of the educational

benefit she contracted to receive with all of the attendant consequences"). Throughout the relevant period, petitioner maintained all the accoutrements of an upper-level management position.

Petitioner also relies on *Fortier* v. *Ameritech Mobile Communications, Inc.*, 161 F.3d 1106 (1998), in which the court of appeals for the Seventh Circuit affirmed the district court's finding that the plaintiff suffered an adverse employment action when his employment was terminated. *Id.* at 1111. The court stated explicitly that the plaintiff did *not* contend that certain prior changes in his responsibilities constituted an adverse employment action. *Id.* at 1112 n.7. Nevertheless, it observed that "adverse job actions can include changes that do not involve quantifiable losses in pay or benefits." *Ibid.* Contrary to petitioner's contention (Pet. 13), that dicta does not "directly conflict[]" with the judgment below. Nothing in the court of appeals' opinion here suggests that a lateral transfer never can constitute an adverse employment action. Indeed, the Fourth Circuit has recognized elsewhere that a seemingly lateral transfer that results in a "decrease[d] * * * level of responsibility, or opportunity for promotion" may rise to the level of an adverse action even "absent any decrease in compensation [or] job title." *Boone*, 178 F.3d at 256-257. Notwithstanding minor variations in wording, the same standard applies in every circuit that has considered the question. This case involves a fact-bound application of that standard. The court of appeals' determination in an unpublished opinion that petitioner's lateral transfer and the surrounding circumstances did not amount to a constructive demotion or other adverse employment action is

correct, and in any event does not merit further review by this Court.[2]

2. Petitioner argues that by affirming the district court's grant of summary judgment to the Department of Labor on her hostile work environment claim, the court of appeals commandeered the jury's role as fact-finder, thereby implicating a circuit split on the question "whether a court, or a jury, should decide initially whether there existed conditions 'severe and pervasive' enough that they created a hostile work environment under Title VII." Pet. 15. Both of those contentions are incorrect. The court of appeals simply held that petitioner failed to demonstrate a genuine issue of material fact concerning harassment or discriminatory motive. Pet. App. 2a. And the circuit split that petitioner purports to identify is illusory.

To establish a case of hostile work environment, petitioner had to show that she was subjected to harassment because of her race and/or sex, and that such harassment was so "severe or pervasive" that it altered the terms and conditions of her employment, creating a work environment that was both objectively hostile and perceived as hostile by petitioner herself. *Faragher* v. *City of Boca Raton*, 524 U.S. 775, 786 (1998); *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Sav.*

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[2] Petitioner also failed to provide any nonconclusory evidence of discriminatory intent, and so failed to satisfy her burden of establishing a prima facie case of discrimination. See *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981) (stating that, to establish a prima facie case, a "plaintiff must prove by a preponderance of the evidence that she [suffered an adverse employment action] under circumstances which give rise to an inference of unlawful discrimination"). Therefore, the judgment below is correct even if petitioner's reassignments were adverse employment actions.

Bank, FSB v. *Vinson*, 477 U.S. 57, 67 (1986). Petitioner argues that the circuits disagree about whether "judges should decide whether the alleged harassing acts created an objectively hostile environment" or whether, instead, "summary judgment can be granted in a harassment case only if *no reasonable jury* could find that the harassment involved created an objectively hostile environment." Pet. 15, 19. There is no such split. The courts of appeals agree that a district court should grant summary judgment (or judgment as a matter of law[3]) on a hostile work environment claim only if no reasonable jury could conclude that discriminatory harassment created a hostile work environment. See *Hatley* v. *Hilton Hotels Corp.*, 308 F.3d 473, 477 (5th Cir. 2002); *Vasquez*, 307 F.3d at 893; *Peters* v. *Renaissance Hotel Operating Co.*, 307 F.3d 535, 552 (7th Cir. 2002); *Beard* v. *Flying J, Inc.*, 266 F.3d 792, 797-798 (8th Cir. 2001); *Rivera-Rodriguez* v. *Frito Lay Snacks Caribbean*, 265 F.3d 15, 24 (1st Cir. 2001); *Abramson* v. *William Paterson Coll.*, 260 F.3d 265, 277 (3d Cir. 2001); *Fitzgerald* v. *Henderson*, 251 F.3d 345, 360 (2d Cir. 2001), cert. denied, 122 S. Ct. 2586 (2002); *Spriggs* v. *Diamond Auto Glass*, 242 F.3d 179, 183 (4th Cir. 2001); *Holbrook* v. *Reno*, 196 F.3d 255, 263 (D.C. Cir. 1999); *Mendoza* v. *Borden, Inc.*, 195 F.3d 1238, 1244 (11th Cir. 1999) (en banc), cert. denied, 529 U.S. 1068 (2000); *Jackson* v. *Quanex Corp.*, 191 F.3d 647, 659 (6th Cir. 1999); *Penry* v. *Federal Home Loan Bank of Topeka*, 155 F.3d 1257, 1261 (10th Cir. 1998), cert. denied, 526 U.S. 1039 (1999).

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[3] This Court has held that the standard for granting summary judgment "mirrors" the standard for a judgment as a matter of law under Federal Rule of Civil Procedure 50(a). *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

The court of appeals' judgment is consistent with that standard. No reasonable jury could find in favor of a party that relies only upon conclusory allegations. See, *e.g.*, *Byrnie* v. *Town of Cromwell, Bd. of Educ.*, 243 F.3d 93, 101 (2d Cir. 2001); *Ridgewood Bd. of Educ.* v. *N.E. ex rel. M.E.*, 172 F.3d 238, 252, 253 (3d Cir. 1999). Thus, a party cannot avoid summary judgment on the basis of such allegations alone, but must produce supporting evidence. See *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-323 (1986). Petitioner did not satisfy that requirement here. The court of appeals stated that petitioner "has failed to demonstrate that she was harassed on the basis of her sex or race, or that the harassment was sufficiently severe or pervasive to alter the terms and conditions of her employment." Pet. App. 2a-3a. It then cited *Causey* v. *Balog*, 162 F.3d 795, 801-802 (4th Cir. 1998), which affirmed the district court's grant of summary judgment to a defendant employer on the ground that the Title VII plaintiff's "conclusory statements, without specific evidentiary support, [could] not support an actionable claim for harassment." Pet. App. 3a. The court of appeals' application of that uncontroversial legal principle to the facts of this case does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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